

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID No. 1212003101
	)	
KENNETH FOWLER,	)	
	)	
Defendant.	)	
	)	

Submitted: March 16, 2018  
Decided: May 23, 2018

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT  
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

Sonia Augusthy, Esquire, Deputy Attorney General, Department of Justice, Wilmington,  
Delaware, Attorney for the State.

Michael W. Modica, Esquire, Wilmington, Delaware, Attorney for Defendant Kenneth  
Fowler.

PARKER, Commissioner

This 23rd day of May 2018, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

### **BACKGROUND AND PROCEDURAL HISTORY**

1. Defendant Kenneth Fowler was charged with drug dealing and conspiracy arising out of an incident that occurred on December 5, 2012.
2. On December 5, 2012, Fowler, while driving a car, was stopped by the police because he was wanted on an unrelated outstanding warrant. Leroy Taylor was the passenger in the car that Fowler was driving. The police smelled marijuana on Leroy Taylor and noticed that inside the car there was a Ziploc bag by the center console just between the passenger's seat and the center console. Inside the Ziploc bag the police found six baggies of cocaine. The Superior Court tried Fowler with Taylor as codefendants.<sup>1</sup>
3. Following a jury trial, on September 6, 2013, Fowler was convicted of drug dealing and conspiracy.
4. Fowler filed a direct appeal to the Delaware Supreme Court. On September 29, 2016, the Delaware Supreme Court determined that Fowler's direct appeal was without merit and affirmed the judgment of the Superior Court.<sup>2</sup>
5. On direct appeal Fowler claimed, among other things, that the trial court erred by not *sua sponte* ordering severance of Fowler's trial from his co-defendant's trial because his co-defendant's defense strategy was hostile to Fowler's own strategy.<sup>3</sup> During the trial, the judge raised the possibility of severance but neither party expressed an interest in it.<sup>4</sup>

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<sup>1</sup> *Fowler v. State*, 2016 WL 5853434, \*1 (Del. 2016).

<sup>2</sup> *Fowler v. State*, 2016 WL 5853434 (Del. 2016).

<sup>3</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>4</sup> See, September 5, 2013 Trial Transcript, at pgs. 14-18.

The Delaware Supreme Court held that Fowler effectively waived any right to severance by not taking the Superior Court up on what was in essence an offer to sever the trial.<sup>5</sup>

6. The Delaware Supreme Court on Fowler's direct appeal further held that even if it considered the claim of plain error for the trial court's not severing of the trials of the co-defendants, the outcome would be the same. Although Fowler and codefendant Taylor had defenses that were at least partially at odds, those tensions did not rise to the level of mutually exclusive defenses that would require severance.<sup>6</sup> In the subject case, the jury could have found one, both or neither of Fowler and Taylor guilty.<sup>7</sup> Thus, the Delaware Supreme Court concluded that the Superior Court did not commit plain error by failing to unilaterally sever the trial.<sup>8</sup>

7. Fowler filed a motion for reduction/modification of sentence which the Superior Court denied by Order dated October 24, 2016.<sup>9</sup> Fowler filed a motion for reargument which was denied by the Superior Court by Order dated December 14, 2016.<sup>10</sup>

8. On January 13, 2017, Fowler filed his first Rule 61 motion.<sup>11</sup> In that motion, Fowler claimed ineffective assistance of trial and appellate counsel. On January 24, 2017, the Superior Court summarily dismissed Fowler's first Rule 61 motion.<sup>12</sup>

9. On March 7, 2017, Fowler filed another motion for modification of sentence which was denied by Order dated March 15, 2017.<sup>13</sup>

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<sup>5</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>6</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>7</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>8</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>9</sup> Superior Court Docket No. 86- October 24, 2016 Order denying Fowler's Motion for Reduction/Modification of Sentence.

<sup>10</sup> Superior Court Docket No. 88- December 14, 2016 Order denying Motion for Reargument.

<sup>11</sup> Superior Court Docket No. 89.

<sup>12</sup> Superior Court Docket No. 92- Order dated January 24, 2017 denying Fowler's First Rule 61 Motion.

<sup>13</sup> Superior Court Docket No. 94- Order dated March 15, 2017 denying Fowler's Motion for Modification of Sentence.

### **DEFENDANT'S PENDING RULE 61 MOTION**

10. On September 26, 2017, Fowler, with the assistance of counsel, filed his second Rule 61 motion.<sup>14</sup> Fowler filed an amended motion on November 14, 2017.<sup>15</sup>

11. Fowler's Rule 61 counsel requested a hearing to confirm that Fowler was no longer pursuing any claims alleging ineffective assistance of appellate counsel in his Rule 61 motion. Rule 61 counsel had represented Fowler on direct appeal and counsel did not want to be placed in a conflict situation in his continued representation of Fowler on the pending Rule 61 motion.<sup>16</sup>

12. The request was granted and the hearing held on January 18, 2018, at which time Fowler confirmed that he was not proceeding with any allegations of ineffective assistance of appellate counsel.<sup>17</sup>

13. In the pending Rule 61 motion, Fowler raises one claim. Fowler claims that his trial counsel was ineffective for failing to move for severance of his trial from his codefendant's trial and/or by waiving severance when the matter was raised by the trial judge.

14. Before making a recommendation, the record was enlarged and Fowler's trial counsel submitted an Affidavit responding to Fowler's claim, the State submitted a response to the claim, and Fowler was afforded an opportunity to submit a reply thereto.<sup>18</sup>

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<sup>14</sup> Superior Court Docket No. 95.

<sup>15</sup> Superior Court Docket No. 99.

<sup>16</sup> See, Superior Court Docket No. 100.

<sup>17</sup> See, Superior Court Docket No. 103.

<sup>18</sup> Super.Ct.Crim.R. 61(g).

15. The claim that Fowler raises in his second Rule 61 motion is procedurally barred and without merit.

16. First, Fowler's claim is procedurally barred because he has failed to satisfy the pleading requirements required to be met before being permitted to proceed with a second Rule 61 motion. Fowler filed the subject Rule 61 motion in 2017, and it is the Rule 61 in effect at the time of the filing of this motion that is applicable.<sup>19</sup>

17. Pursuant to the applicable Rule 61 in effect at the time of the filing of this motion, for second Rule 61 motions, like that presented in the subject action, motions are to be summarily dismissed unless the defendant establishes: 1) that *new* evidence exists that creates a strong inference that the defendant is actually innocent of the charges for which he was convicted, or 2) the existence of a *new* rule of constitutional law made retroactive to cases on collateral review rendered his convictions invalid.<sup>20</sup>

18. Fowler has not pled with particularity that any *new* evidence exists that creates a strong inference that he is actually innocent of the charges for which he was convicted nor that there is a *new* rule of law that would render his conviction invalid.

19. Fowler does not raise anything new or recently discovered. Fowler's claim stems from facts known to him at the time his trial in 2013, and he already raised the claim raised herein in some fashion on direct appeal, which was decided in 2016. On direct appeal, Fowler contended that the trial court erred when it failed to sever his trial from his co-defendant's trial. Fowler now claims that his trial counsel was ineffective for failing to request that his trial be severed from his co-defendant's trial. Fowler was aware of, had time to, and the opportunity to raise this claim in his first Rule 61 motion. As such, Fowler

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<sup>19</sup> See, *Bunting v. State*, 2015 WL 2147188, ftnt. 7 (Del.).

<sup>20</sup> Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i) (effective June 4, 2014).

has failed to meet the pleading requirements allowing him to proceed with his pending Rule 61 motion. In accordance with the mandates of Rule 61, Fowler's pending motion should be dismissed.<sup>21</sup>

20. Second, even if this claim was considered on its merits, Fowler would not prevail. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.<sup>22</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.<sup>23</sup>

21. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>24</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.<sup>25</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>26</sup>

22. In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.<sup>27</sup> It is all too easy for a court, examining counsel's defense

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<sup>21</sup> Super.Ct.Crim.R. 61(d)(2) & (5); and Rule 61(i).

<sup>22</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

<sup>23</sup> *Id.* at 687-88, 694.

<sup>24</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>25</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>26</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>27</sup> *Strickland*, 466 U.S. at 688-89.

after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.<sup>28</sup> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or “Monday morning quarterbacking” should be avoided.<sup>29</sup>

23. The United States Supreme Court recognized that there are countless ways to provide effective assistance in any given case.<sup>30</sup> Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, defense counsel must be given wide latitude in making tactical decisions.<sup>31</sup> Counsel’s representation must be judged by the most deferential of standards. There is a strong presumption that defense counsel’s conduct constituted sound trial strategy.<sup>32</sup> Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that counsel’s conduct was reasonable and constituted sound trial strategy.<sup>33</sup>

24. It is against this backdrop that Fowler’s claim of ineffective assistance of counsel is considered.

25. The Delaware Supreme Court on Fowler’s direct appeal has already held that this case was not one that rose to the level of the defendants having mutually exclusive defenses which would require severance.<sup>34</sup> In this case, the jury could have found one, both or either of Fowler and his co-defendant Taylor guilty.<sup>35</sup>

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<sup>28</sup> *Strickland*, 466 U.S. at 688-89.

<sup>29</sup> *Strickland*, 466 U.S. at 688-89.

<sup>30</sup> *Harrington v. Richter*, 131 S.Ct. 770, 787-788 (2011).

<sup>31</sup> *Harrington v. Richter*, 131 S.Ct. 770, 788-789 (2011).

<sup>32</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>33</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998); *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>34</sup> *Fowler v. State*, 2016 WL 5853434, \*2 (Del. 2016).

<sup>35</sup> *Id.*

26. Fowler's trial counsel acknowledges that he never moved to sever Fowler's trial from his co-defendant's trial, or to pursue severance further when it was raised by the trial court. Fowler's trial counsel explains that the decision not to do so was a tactical decision. In his Affidavit, Fowler's trial counsel details the basis for this strategic decision.<sup>36</sup>

27. Trial counsel explains that his strategy decision was simple. The evidence against co-defendant Taylor was overwhelming while the evidence against Fowler, in comparison, was paltry.<sup>37</sup>

28. Specifically, trial counsel explains that leading up to trial, he had no reason to move to sever Fowler's trial from his co-defendant's trial. Neither defendant had given statements in this case.<sup>38</sup> While preparing for trial, counsel and Fowler discussed the possibility of Fowler testifying and shifting the blame to his co-defendant Taylor. Fowler was adamant that he would not testify to implicate Taylor at trial. Fowler also seemed confident that Taylor would not testify and try to shift the blame to Fowler at trial.<sup>39</sup>

29. Fowler's counsel explained to Fowler that even though Fowler was unwilling to testify against Taylor, counsel would work to shift the blame to Taylor at trial. Even though the possibility existed that Taylor could potentially seek to shift the blame to Fowler, counsel was not concerned about that possibility given the overwhelming evidence against Taylor and the, in comparison, paltry evidence against Fowler.<sup>40</sup> Counsel did not believe that Fowler would be convicted of drug dealing, based on the facts and evidence the State

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<sup>36</sup> See, Superior Court Docket No. 101- Affidavit of Trial Counsel.

<sup>37</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel.

<sup>38</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*2.

<sup>39</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*2.

<sup>40</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*2-5.



presented, even when considering that the evidence would include that Fowler's police contact was precipitated by an outstanding warrant to Fowler.<sup>41</sup>

30. Fowler's trial counsel also recognized that whether or not the court severed Fowler's trial from Taylor's trial, the fact that the police contact was initiated because of Fowler's outstanding arrest warrant was going to come into evidence.<sup>42</sup> This fact is important to emphasize. Both the State and co-defendant Taylor wanted to raise the issue that the police contact was initiated because of Fowler's outstanding arrest warrant.<sup>43</sup> Although Fowler's counsel objected to the introduction of this information at trial, the court ruled that it would be admissible.<sup>44</sup> Irrespective of whether the trials were joint or severed, that information was going to come into evidence, either way.

31. Fowler's trial counsel balanced the pros and cons of having a joint trial versus a severed trial and on balance felt that the pros of a joint trial outweighed the cons.

32. Prior to trial, Fowler's counsel had successfully suppressed drug evidence seized from Fowler's residence. As a result, the following favorable facts were presented and highlighted during the trial:

- The police smelled marijuana on Taylor when removing him from the car.
- The police did not smell marijuana on Fowler when removing him from the car.
- The police determined that Fowler was not the registered owner of the vehicle.
- After Taylor was removed from the car, the police officer noticed a clear plastic baggy sticking up from between the passenger seat (where Taylor was sitting) and the center console.
- When searched, Taylor had a little over \$1000 in his pocket and a cell phone.

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<sup>41</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*3.

<sup>42</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*4.

<sup>43</sup> See, September 4, 2013 Trial Transcript, at pgs. 2-9; September 5, 2013 Trial Transcript, at pgs. 7-23.

<sup>44</sup> *Id.*

- Taylor's cell phone had a significant number of drug related text messages, none of which were sent from, or to, Fowler.
- There were no drug related text messages on Fowler's phone.
- The State's drug dealing expert hesitated when opining on whether Taylor or Fowler had the intent to distribute the small amount of crack cocaine recovered in this case.<sup>45</sup>

33. The negative facts were that there was an outstanding arrest warrant for Fowler which was the reason for the stop, Fowler was the driver and Taylor the passenger, and Fowler and Taylor spoke to each other on the phone regularly.<sup>46</sup> These negative facts would be presented by the State whether or not the trial was severed.<sup>47</sup>

34. The trial court raised the severance of the trials on the day of trial. The trial court raised the issue in response to the parties' concerns related to Fowler's outstanding arrest warrant. Fowler's counsel argued that the existing arrest warrant for Fowler on an unrelated matter should not be admissible at trial. The State argued that while the substance of the arrest warrant was not admissible at this trial, the existence of the warrant was admissible because the State had a right to explain why the police approached Fowler's car in the first place. Since the existence of Fowler's outstanding arrest warrant would come into evidence whether his trial was severed or not, counsel believed that, on balance, he would prefer to have the co-defendants tried together given the overwhelming evidence against Taylor and the "paltry" evidence against Fowler.<sup>48</sup>

35. When balancing the pros and cons of seeking a severance of the trials, Fowler's counsel believed that the State's case against Fowler was weak as compared to Taylor.

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<sup>45</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*3-4.

<sup>46</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*4.

<sup>47</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, \*4-5.

<sup>48</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*4.

Counsel believed that any effort by Taylor to attempt to shift the blame to Fowler would not be found credible by the jury since it was Taylor who was sitting next to the drugs, with over \$1000 in cash in his pocket, and a cell phone full of text messages arranging drug deals.<sup>49</sup>

36. In Fowler's Rule 61 motion, he contends that counsel advised him that he would not seek severance of the trials because of counsel's belief that Taylor would not appear favorably to the jury and that Fowler would appear more favorable. Fowler appears to be under the misimpression that counsel's decision was based on the physical appearance of the co-defendants.

37. As trial counsel explained, based on his evaluation of all the facts, he determined that Fowler would appear more favorable to the jury than Taylor, and that it was preferable for the codefendants to be tried together.<sup>50</sup> It appears that Fowler is under the misimpression that counsel's decision was based on the physical appearance of the co-defendants. That is incorrect. The strategic decision was made based on the relative appearances of the defendants based on the facts of the case. The strategy decision was simple. The evidence against Taylor was overwhelming while the evidence against Fowler, in comparison, was paltry. Counsel's belief that Fowler appeared more favorably as compared to Taylor were based on the facts of the case.<sup>51</sup>

38. Fowler's counsel made a reasonable strategic decision. Contrary to Fowler's assertion in his Rule 61 motion, the decision to have the co-defendants tried together was not illogical or arbitrary. The Delaware Supreme Court on Fowler's direct appeal

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<sup>49</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*2-5.

<sup>50</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*5.

<sup>51</sup> Superior Court Docket No. 101- Affidavit of Trial Counsel, at \*5.

recognized that this was not a case that rose to the level of the defendants having mutually exclusive defenses which would require severance. Fowler's trial counsel weighed the pros and cons of a joint versus a severed trial. Although the joint trial with Taylor exposed Fowler to negative testimony, comments and innuendo initiated by Taylor's counsel, it allowed Fowler's counsel to point the finger at Taylor. Trial counsel did anticipate Taylor's strategy to shift the blame to Fowler based on the fact that he was the original target of the police on an unrelated matter, but determined that on balance the pros outweighed the cons of proceeding with a joint trial.

39. Perhaps reasonable minds may differ and another attorney defending Fowler may have made a different decision. As the United States Supreme Court cautioned it is all too easy for a reviewing court examining counsel's tactical decisions after they were proven unsuccessful to conclude that a different decision should have been made. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Defense counsel must be given wide latitude in making tactical decisions. There is a strong presumption that counsel's conduct was reasonable and constituted sound trial strategy. Fowler has not met his burden to overcome this presumption that counsel's conduct was reasonable and constituted sound trial strategy.

40. Finally, Fowler has not established that he suffered actual prejudice as a result of proceeding with a joint trial rather than a severed trial. The evidence against Fowler as to the fact that he was wanted by the police on an unrelated matter and that was the reason for the stop by the police would have been admitted irrespective of whether the co-defendants

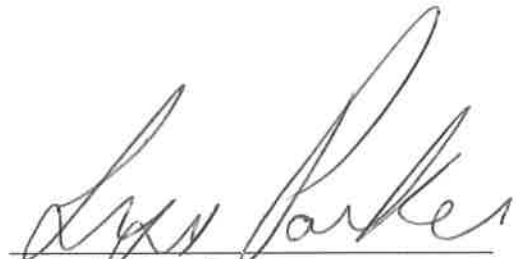
were tried jointly or separately. Fowler has not established actual prejudice as a result of the introduction of this evidence at trial, which the court held would be admissible.

41. Fowler failed to establish that his counsel's strategic decision was deficient in any respect or that he was actually prejudiced as a result thereof. Fowler's claim raised in his second Rule 61 motion is procedurally barred and without merit.

42. Fowler's request for an evidentiary hearing is denied. Following a full, comprehensive and thorough review of the evidentiary record, Fowler's allegations were either reasonably discounted as not supported by the record or not material to a determination of Fowler's claim. It does not appear that an evidentiary hearing will aid in the resolution of this motion and is denied.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

  
Commissioner Lynne M. Parker

cc: Prothonotary  
Albert J. Roop, V, Esquire